

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Federal-State Joint Board on )  
Universal Service; Promoting )  
Deployment and Subscribership )  
in Unserved and Underserved Areas, )  
Including Tribal and Insular Areas )

CC Docket No. 96-45

**COMMENTS OF WESTERN WIRELESS CORPORATION**  
**ON PETITIONS FOR RECONSIDERATION**

Western Wireless Corporation ("Western Wireless") submits that the Commission should advance the positive initial steps already taken in this proceeding 1/ by acknowledging and fulfilling the requests that the FCC pay due deference to tribal sovereignty and authority. 2/ To accomplish this goal, the FCC must take two key steps in response to the petitions for reconsideration of the *Twelfth Report and Order*. First, with respect to its federal trust relationship with the nation's

1/ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, *Twelfth Report and Order*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 00-208 (rel. June 30, 2000) ("*Twelfth Report and Order*"). These Comments are filed pursuant to 47 C.F.R. § 1.429(f) and the Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, CC Docket No. 96-45, Report No. 2439 (rel. Sept. 11, 2000), published in 65 Fed. Reg. 55979 (Sept. 15, 2000) ("Public Notice").

2/ See Petition for Reconsideration by the Crow Tribe of Montana ("Crow Tribe"); Petition for Reconsideration by the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community of Montana ("Fort Belknap"); Petition for Reconsideration by the Confederated Tribes of the Goshute Reservation of Utah and Nevada ("Confederated Goshute"); Petition for Reconsideration by the Rosebud Sioux Tribe of South Dakota ("Rosebud Sioux"); Petition for Reconsideration by the Oglala Sioux Tribe of South Dakota ("Oglala Sioux").

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Indian tribes and the petitions for reconsideration filed by some of those tribes, the Commission should revise its approach to the jurisdictional determination under 47 U.S.C. § 214(e)(6) in a manner consistent with Western Wireless' Petition for Reconsideration. <sup>3/</sup> Second, the Commission should, in all other respects, reject the petitions for reconsideration arguing that states have authority to determine the FCC's jurisdiction to designate eligible telecommunications carriers ("ETCs"), and raising other fundamental challenges to the *Twelfth Report and Order*. <sup>4/</sup> Rather, the Commission should affirm the actions taken in that order.

**I. THE COMMISSION SHOULD GIVE APPROPRIATE DEFERENCE TO TRIBAL SOVEREIGNTY AND AUTHORITY IN DESIGNATING ETCs TO PROVIDE UNIVERSAL SERVICE ON INDIAN RESERVATIONS**

The Commission should take expeditious action in response to the several Indian Tribes that have filed requests that the FCC more readily recognize tribal sovereignty by routinely and quickly assuming jurisdiction to designate ETCs to provide universal service to reservations, given that the predicate for doing so is a lack of state jurisdiction. <sup>5/</sup> By adopting the *Twelfth Report and Order*, the Commission has already acknowledged the critical need for additional funding to

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<sup>3/</sup> See Crow Tribe, *passim*; Fort Belknap at 2; Confederated Goshute at 2; Oglala Sioux at 2. Western Wireless is filing concurrently herewith a jurisdictional analysis in support of its FCC petition for designation as an ETC on the Crow Reservation. See *Twelfth Report and Order*, ¶ 140.

<sup>4/</sup> See Petition for Reconsideration of the South Dakota Independent Telephone Coalition ("SDITC"); Petition for Reconsideration of the Florida Public Service Commission ("Florida PSC").

<sup>5/</sup> See 47 U.S.C. § 214(e)(6) ("In the case of a common carrier . . . that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier . . . as an [ETC]").

make basic telecommunications more affordable on Indian Reservations, and for additional incentives to spur carriers to improve existing service and extend new service to tribal lands. 6/ In addition, the Commission has noted that delays in designating carriers as ETCs to serve tribal lands will no doubt inhibit the effectiveness of *any* universal service support mechanism (new or old) designed to ensure the availability of telecommunications. 7/ If no new ETCs enter tribal areas to improve the telecommunications infrastructure and service offerings, there is no assurance that the incumbents will improve the current state of affairs. 8/

There is clearly a need for the FCC to assume jurisdiction more readily over ETC applications for reservations under the agency's federal trust relationship with Native Americans, and for the agency to demonstrate greater respect for tribal sovereignty. Each of the Indian Tribes that filed petitions for reconsideration has urged the FCC to recognize the Tribes' need to take action to improve telephone service on their reservations, and their right to do so as sovereign entities. 9/ They

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6/ *Twelfth Report and Order*, ¶¶ 20-21, 34-35.

7/ *Id.*, ¶ 94.

8/ See, e.g., Crow Tribe at 3 ("The Crow Tribe doubts Western Wireless' ETC Petition will be granted if subject to state jurisdiction, given the weak regulation Montana has had over local exchange carriers on the Crow Reservation[.] The consequences are clear. Status quo will remain and Reservation residents will continue to suffer.").

9/ *Id.* at 6-7 (noting that "the Crow Tribe intends to enter into a consensual relationship with Western Wireless to provide much needed wireless telephone services" and that "telephone service is absolutely essential for the social well being, health, and economic stability of the members of the Crow Tribe.") (citing *Montana v. United States*, 450 U.S. 544 (1981)); Confederated Goshute at 2 (indicating that the tribes have been exploring ways to improve service on their reservations while awaiting a decision on the Crow petition, and arguing that expecting Western

have expressed concern that the *Twelfth Report and Order* "is a critical detriment to the sovereignty of Indian Country in pursuit of overcoming their 'digital divide,'" and noted that "[r]equiring a carrier to establish [FCC] jurisdiction through an exhaustive legal proceeding will have a chilling effect on any carrier seeking to provide service on reservations." 10/ And, they have pointed to the lack of state concern for the particular needs of Native Americans with respect to facilitating entry by new carriers to bolster telecommunications service on reservations. 11/

In a recent speech, Chairman Kennard recalled the "many federal officials [who] come to Indian country and hold hearings, conduct inspections, speak gravely and promise change," and fail to follow through. 12/ He quoted the "Indian wise man, Shinguaconse, who also spoke of broken promises when he said, 'I would have been better pleased if such promises were not made than that they should be made and not kept.' Well," the Chairman continued, "we resolved to keep our promises." 13/ But the Tribes that filed petitions for reconsideration here make it clear that the Commission has not done nearly enough in this regard. The FCC has yet to designate a non-Indian-owned ETC on tribal lands, and the Tribes have

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Wireless to negotiate with both Nevada and Utah to allow the provision of universal service on the reservations, where the states lack jurisdiction in any event, is unreasonable).

10/ Rosebud Sioux at 2.

11/ Oglala Sioux at 2 (noting that "the South Dakota Public Utilities Commission has denied Western Wireless ETC status in South Dakota, notwithstanding the needs" of the Tribe).

12/ William E. Kennard, Chairman, Federal Communications Commission, Remarks before the Indian Telecom Training Initiative, St. Paul, Minn., Sept. 28, 2000 ("Kennard Speech").

criticized the *Twelfth Report and Order* for failing to recognize the authority and need of the Tribes to improve telephone service on their reservations. 14/ While the Chairman's words are welcome, the Commission needs to follow through with concrete actions. The Commission must keep its promises.

Thus, as part of the "institutional commitment" 15/ called for by the Tribes here, the Commission should more readily assume jurisdiction to designate new carriers to provide universal service on Indian reservations, starting with Western Wireless' petition for designation as an ETC to serve the Crow Reservation in Montana. Western Wireless has the widespread support of the Tribes in this endeavor, 16/ and has demonstrated that the FCC has ample legal authority to assume jurisdiction under Section 214(e)(6) to grant ETC designation to a carrier like Western Wireless that seeks federal support for universal service directed toward tribal lands. 17/ The Commission should use the authority it clearly has under Section 214(e)(6), and grant the Tribes' petitions for reconsideration seeking that the FCC pay greater deference to tribal sovereignty and authority, and live up to its own responsibilities under its federal trust relationship with the country's Native Americans. 18/

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13/ *Id.*

14/ *See supra* notes 9-11 and accompanying text.

15/ *See* Kennard Speech *supra*.

16/ *See* Crow Tribe, *passim*; Fort Belknap at 2; Confederated Goshute at 2; Oglala Sioux at 2.

17/ Western Wireless Petition for Reconsideration at 4-15.

18/ Western Wireless agrees with the Crow Tribe's complaint that "we do not agree with the Commission's decision that our tribal sovereignty is preempted by

## II. THE COMMISSION SHOULD REJECT CALLS TO REVERSE THE DECISION THAT THE FCC WILL BE THE INITIAL ARBITER OF SECTION 214(e)(6) JURISDICTION FOR ETC APPLICANTS ON TRIBAL LANDS

The Commission should reject SDITC's argument that the states, rather than the FCC, should make the initial jurisdictional determination on Section 214(e)(6) petitions seeking ETC designation for federal universal service support for tribal lands. 19/ SDITC makes the misplaced argument that the "on its own motion or upon request" language in Section 214(e)(2) precludes the FCC from interpreting Section 214(e)(6)'s "not subject to the jurisdiction of a State commission" language in a manner that would allow the FCC to make the initial jurisdictional determinations for tribal lands. 20/ SDITC supports its argument with the baseless contention that a state's ability to designate ETCs "on its own motion" means that the state must, by definition, have authority to resolve the question of whether it has jurisdiction over *every* carrier. 21/ SDITC's statutory argument, however, is circular and unfounded.

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the State of Montana," and its request that the FCC recognize the tribe's sovereignty, Western Wireless' responsiveness to tribal attorneys and officials, and the parties' Joint Statement of Interest. See Letter from Sam Painter, General Counsel for the Crow Tribe of Indians, to William E. Kennard, Chairman, Federal Communications Commission, filed September 5, 2000, in conjunction with the Crow Tribe Petition. Western Wireless elaborates on the need for FCC action on the company's petition for ETC designation for the Crow Reservation in the supplemental filing on that petition submitted concurrently herewith, as contemplated in the *Twelfth Report and Order* at ¶ 140.

19/ SDITC at 4-5.

20/ *Id.*

21/ *Id.* at 4.

Section 214(e)(2) of the Act allows a state commission to, "on its own motion," designate as ETCs only those carriers over which the state commission has jurisdiction in the first place. 22/ SDITC's argument assumes that because state commissions have authority to designate carriers within their jurisdiction as ETCs, they must have authority to determine whether carriers that may not be within their jurisdiction are "subject to the jurisdiction of a state commission" for purposes of Section 214(e)(6). This reasoning is circular and should be rejected. 23/

Thus, a reviewing court would sustain the Commission's determination that Section 214(e)(6) is ambiguous with regard to whether the FCC or a state commission should make the initial determination of whether a state commission lacks

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22/ For example, a state commission in Florida would not, despite the language in Section 214(e)(2), have authority to designate as an ETC in Florida a carrier that provides service only in Maine and has no presence in or ties to Florida. In addition, the Florida commission would be hard pressed to assert authority to haul the Maine carrier before it for a determination of whether the Florida commission has authority to, "on its own motion," designate the carrier as an ETC in Florida. This logic applies not just in jurisdictions a thousand miles apart, but also where one jurisdiction completely surrounds another, sovereign jurisdiction, such as in the case of an Indian reservation that lies within a state's boundaries. Hence, if a state commission lacks jurisdiction over a carrier for "on its own motion" designations under Section 214(e)(2) because, for example, the carrier is serving primarily an Indian reservation, the state commission also lacks jurisdiction to haul the carrier before it to determine whether Section 214(e)(6) applies.

23/ SDITC's attempt to support its position by arguing that Congress did not intend Section 214(e)(6) to change the authority of state commissions under Section 214(e)(2) is misplaced for the same reason, *i.e.*, it presumes state jurisdiction where none exists. The *premise* of Section 214(e)(6) is that the state lacks all jurisdiction over a carrier's offering that is the subject of an ETC petition. If the state lacked that jurisdiction over a carrier before the adoption of Section 214(e)(6), its jurisdiction is similarly lacking now, and there is no basis for the state to assume even limited authority to determine whether state or tribal jurisdiction applies.

jurisdiction over a carrier. 24/ The Commission's decision on how to approach the jurisdictional issue for service on Indian lands therefore is entitled to substantial deference. 25/ The Commission's selection of itself as the arbiter on the initial jurisdictional question for tribal ETC applications is particularly appropriate given that the federal government is charged with a trust responsibility to assist tribal self-government, a matter which state commissions are likely not to accord sufficient deference. 26/ The FCC's decision in the *Twelfth Report and Order* with regard to the jurisdictional approach to ETC applications proposing to serve Indian reservations should be left undisturbed. 27/

### **III. THE COMMISSION SHOULD DENY THE FLORIDA PSC'S REQUEST TO ELIMINATE THE ADDITIONAL UNIVERSAL SERVICE SUPPORT AVAILABLE FOR TRIBAL LANDS**

The Commission should reject the Florida PSC's request that the FCC repeal all the mechanisms for providing additional support to tribal lands. The

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24/ *Twelfth Report and Order*, ¶ 101 (citing *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177, 21211 (1999)).

25/ *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

26/ *See infra* Section I.

27/ In addition, the Commission should deny SDITC's request for reconsideration of the decision that wireless carriers are eligible for Link Up support for the portion of a handset that receives a wireless signal. SDITC at 7-8 (citing *Twelfth Report and Order*, ¶ 61). The Commission correctly determined that, like fixed-wireless or satellite network interface devices necessary to receive over-the-air universal service from non-wireline ETCs, the portions of a handset that receive over-the-air wireless signals, if distinguishable from run-of-the-mill customer premises equipment, should be included in the costs that can be recovered on the network side of the network interface device.



Commission implemented several important initiatives in the *Twelfth Report and Order* to help improve telephone service on tribal lands where, as the Commission noted, penetration is substantially lower than in the rest of the nation. 28/ The new rules adopted in the *Twelfth Report and Order* will do much to help those living on tribal lands afford the telecommunications service that has become so important to modern life. 29/

Even if other measures taken in the *Twelfth Report and Order* – such as establishing new and more appropriate proxies for income – will help improve telephone penetration on tribal lands, the comments received in the proceeding indicate that the infusion of additional support will make it even more likely that those living on tribal lands will be able to afford telephone service, and that carriers will be incented to provide improved service. 30/ In carrying out its federal trust relationship with the nation's Indian Tribes, the Commission should employ all measures at its disposal to ensure that those living on reservations are not left behind as telecommunications service becomes more important in day-to-day life. 31/ Until the effectiveness and impact of the new rules can be fairly assessed, they should not be supplanted or significantly revised to provide less support or incentive for improving telephone service on tribal lands.

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28/ *Twelfth Report and Order*, ¶ 2.

29/ *Id.*, ¶¶ 27-28.

30/ *See Twelfth Report and Order*, ¶¶ 59 n.155, 60, 62 & n.174.

31/ *See supra* note 4.

#### IV. CONCLUSION

For the foregoing reasons, Western Wireless respectfully requests that the Commission grant the petitions for reconsideration filed by several Indian Tribes and by Western Wireless seeking a more assertive FCC role in designating ETCs to provide universal service to Indian reservations, and that the Commission otherwise deny the petitions for reconsideration of the *Twelfth Report and Order* seeking to limit the FCC's federal trust responsibility to the Tribes and the federal universal service support available for Indian reservations.

Respectfully submitted,

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